

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, UNIDENTIFIED PSPs A to Z, and NPCC MEMBERS: CENTRAL TELEPHONE, INC.; COMMUNICATION MANAGEMENT SERVICES, LLC; DAVEL COMMUNICATIONS a/k/a PHONETEL TECHNOLOGIES, INC.; INTERWEST TELECOM SERVICES CORPORATION; NCS COMMUNICATIONS PUBLIC SERVICES CORPORATION; NATIONAL PAYPHONE SERVICES, LLC; PACIFIC NORTHWEST PAYPHONES; PARTNERS IN COMMUNICATION; T & C MANAGEMENT, LLC; CORBAN TECHNOLOGIES, INC.; and VALLEY PAY PHONES, INC.,

09-CV-1351-BR

OPINION AND ORDER

Plaintiffs,

v.

QWEST CORPORATION,
UNIDENTIFIED CORPORATIONS I-X,
and JOHN DOES 1-10,

Defendants.

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BROWN, Judge.

This matter comes before the Court on Defendant Qwest Corporation's Motion (#12) to Dismiss First Amended Complaint or to Stay. For the reasons that follow, the Court **GRANTS** Qwest's Motion and dismisses this matter.

BACKGROUND

I. Regulatory Background.

In 1996 Congress amended the Federal Communications Act of 1934 in part to improve competition in the telecommunications industry in the wake of the breakup of the former AT&T into Bell Operating Companies (BOCs). See 47 U.S.C. § 151, *et seq.* In

particular, Congress enacted §§ 201 and 276 of the Act to promote greater competition among payphone service providers (PSPs) and to prevent Local Exchange Carriers (LECs) that were often owners of payphone lines and payphone service providers from discriminating against other PSPs in favor of their own payphone services. In *Davel Communications, Inc. v. Qwest Corporation*, PSPs and LEC Qwest disputed certain payphone service tariffs charged by Qwest. 460 F.3d 1075 (9th Cir. 2006). In *Davel* the Ninth Circuit set out the following regulatory background that summarizes the numerous administrative orders issued by the Federal Communications Commission (FCC) in its implementation of the Act:

Chapter 5 of the Federal Communications Act of 1934 as amended by the 1996 Act regulates the telecommunications industry. 47 U.S.C. § 151 *et seq.* As a general matter, the Federal Communications Act requires common carriers subject to its provisions to charge only just and reasonable rates, *id.* § 201, and to file their rates for their services with the FCC or, in some cases, with state agencies. *Id.* § 203. As part of the 1996 Act's general focus on improving the competitiveness of markets for telecommunications services, § 276 substantially modified the regulatory regime governing the payphone industry by providing, in general terms, that dominant carriers may not subsidize their payphone services from their other telecommunications operations and may not "prefer or discriminate in favor of [their] payphone service[s]" in the rates they charge to competitors. *Id.* § 276(a). The 1996 Act directs the FCC to issue regulations implementing these provisions, specifying in some detail the mandatory

contents of the regulations. *Id.* § 276(b).

Pursuant to this directive, the FCC adopted regulations requiring local exchange carriers such as Qwest to set payphone service rates and "unbundled features" rates, including rates for fraud protection, according to the FCC's "new services test" (sometimes "NST"). The new services test requires that rates for those telecommunications services to which it applies be based on the actual cost of providing the service, plus a reasonable amount of the service provider's overhead costs. The FCC's regulations required local exchange carriers to develop rates for the use of public access lines by intrastate payphone service providers that were compliant with the new services test. The rates were to be submitted to the utility commissions in the states in the local exchange carriers' territory, which would review and "file" (i.e., approve) the rates. See *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 96-388, 11 F.C.C.R. 20,541 (Sept. 20, 1996); *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, FCC 96-439, 11 F.C.C.R. 21,233 (Nov. 8, 1996) ¶ 163 ("Order on Recons.") (collectively "Payphone Orders"). Also pursuant to the regulations, local exchange carriers were required to file their "unbundled features" rates with both the state commissions and the FCC for approval. *Order on Recons.* ¶ 163. The FCC required the local exchange carriers to file the new tariffs for both kinds of rates by January 15, 1997, with an effective date no later than April 15, 1997. *Id.*

In addition, the Payphone Orders required interexchange carriers, mainly long distance telephone service providers, to pay "dial-around compensation" to payphone

service providers, including Qwest, for calls carried on the carrier's lines which originated from one of the provider's pay telephones. If, however, the payphone service provider was also an incumbent local exchange carrier, as was Qwest, the Payphone Orders required full compliance with the new tariff filing requirements, including the filing of cost-based public access line rates and fraud protection rates, before the local exchange carrier could begin collecting dial-around compensation.

* * *

On April 15, 1997, the FCC issued an order granting a limited waiver of the new services test rate-filing requirement. *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order*, DA 97-805, 12 F.C.C.R. 21,370 (Apr. 15, 1997) ("Waiver Order"). Specifically, the Waiver Order granted an extension until May 19, 1997, for filing intrastate payphone service rates compliant with the new services test, while at the same time permitting incumbent local exchange carriers to begin collecting dial-around compensation as of April 15, 1997. *Id.* ¶ 2. The Waiver Order stated that the existing rates would continue in effect from April 15, 1997, until the new, compliant rates became effective ("the waiver period"). The NST-compliant rates were to be filed with state utility commissions, which were required to act on the filed rates "within a reasonable time." *Id.* ¶ 19 n.60; see also *id.* ¶¶ 2, 18-19, 25. If a local exchange carrier relied on the waiver, it was required to reimburse its customers" from April 15, 1997 in situations where the newly [filed] rates, when effective, are lower than the existing [filed] rates." *Id.* ¶¶ 2, 20, 25. The order emphasized that the waiver was "limited" and "of brief duration." *Id.* ¶¶ 21, 23.

460 F.3d at 1081-83 (footnotes omitted).

II. Administrative History.

Plaintiff Northwest Public Communications Council (NPCC) is a regional trade organization that represents companies providing public payphone services. Some of its members, including the named Plaintiffs, purchase payphone services from Defendant Qwest and are generally known as PSPs. Qwest is a BOC as defined in 47 U.S.C. § 153 and a regulated LEC that owned nearly 80% of the payphone lines in Oregon during the relevant period until it sold its payphone services business in 2004.

On June 16, 2010, the Court requested the parties to file a joint statement of the history of this matter. On July 9, 2010, the parties filed a Stipulation (#56) Regarding Procedural History of the Case in which the parties provided the Court with a summary of the relevant administrative background. In addition, the parties jointly submitted thirty-five documents to support their factual summary.¹ The Stipulation essentially creates a time-line summarizing four categories of events related to this matter: (1) the numerous FCC orders that implement the Telecommunications Act of 1996, including the "Waiver Order" and

¹ Under Federal Rule of Evidence 201, the Court may take judicial notice of documents that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Court finds the documents submitted by the parties as part of their Stipulation Regarding the Procedural History of the Case are suitable for judicial notice, and, therefore, the Court, in the exercise of its discretion, takes judicial notice of those documents.

the "Wisconsin Order"; (2) the history of Qwest's payphone tariff rates for Public Access Lines (PALs) and Fraud Protection services (CustomNet) charged and filed with the Oregon Public Utilities Commission (PUC); (3) the procedural history of NPCC's claim filed with the PUC in May 2001 against Qwest for refunds of tariffs paid to Qwest (Docket DR 26/UC 600) ("Refund Case"); and (4) the history of Qwest's general rate-setting case at the PUC (Docket UT 125) ("Rate Case"). The Court incorporates by reference the administrative history stipulated to by the parties and summarizes the following relevant facts from the parties' Stipulation for purposes of this Motion:

A. Qwest's Oregon Payphone Tariff Rates.

In September 2001 the PUC concluded the Rate Case in which it facilitated the design of and ultimately adopted certain Qwest tariff rates for payphone services. In March 2002 NPCC appealed the PUC's final rate determination to the Marion County Circuit Court and subsequently appealed that court's decision to the Oregon Court of Appeals in October 2002. While the appeal was pending, Qwest filed acknowledgments with the PUC on February 14 and July 28, 2003, that reflected respectively Qwest's reduction of PAL and CustomNet rates. Qwest contended those reductions were compliant with the FCC orders that the rates were to be set in accordance with the "New Services Test" (NST). The PUC accepted Qwest's rate filings and made the rates effective for

PAL on March 17, 2003, and for CustomNet on August 28, 2003.

In November 2004 the Oregon Court of Appeals issued its decision in *Northwest Public Communications Council v. Public Utilities Commission of Oregon* in which it reversed the Marion County Circuit Court, remanded the PUC's initial rate-setting decision, and required the PUC to reconsider the payphone services rates in light of the recent FCC orders, including the Wisconsin Order that clarified the method for applying the NST. 196 Or. App. 94 (2004).

On October 15, 2007, during the process of resolving the order of remand from the Oregon Court of Appeals, Qwest and NPCC stipulated that the PAL and CustomNet rates submitted by Qwest and approved by the PUC in 2003 were NST-compliant. On November 15, 2007, the PUC adopted that stipulation and confirmed Qwest's compliance with the NST for PAL and CustomNet rates.

B. The Refund Case.

In May 2001 NPCC filed a complaint with the PUC seeking refunds of PAL rates that NPCC allegedly paid in excess of the NST-compliant rates. In 2004 and 2005 the parties filed cross-motions for summary judgment with the PUC on the issue of Qwest's refund liability for PAL rates. In March 2005 an ALJ held the case in abeyance rather than ruling on the merits with the hope that the FCC would issue additional guidance as to the Waiver Order's application. Because that guidance was ultimately

not forthcoming, NPCC moved to lift the abeyance, the PUC granted that motion, and the PUC reinstated the case on February 5, 2009. NPCC then moved to amend its complaint to add its CustomNet rate claims to its claims for PAL refunds. In May 2009 the PUC denied NPCC's motion to add the CustomNet claims partly on the ground that they were barred by the statute of limitations.

According to the parties' representations, NPCC and Qwest's pending motions for summary judgment as to NPCC's refund claim for PAL rates allegedly not NST-compliant are pending before the PUC and are on track to be resolved soon.

PROCEDURAL BACKGROUND IN THIS COURT

This matter comes before the Court after more than 12 years of administrative and legal proceedings between Qwest and NPCC at the state level. On November 13, 2009, Plaintiff NPCC and many of its constituent members filed a Complaint in this Court. On January 12, 2010, Plaintiffs filed a First Amended Complaint asserting 18 claims against Defendants Qwest Corporation, Unidentified Corporations I-X, and John Does 1-10. Plaintiffs seek (1) a declaratory judgment as to the rights between the parties concerning certain payphone services rates that Defendants allegedly charged Plaintiffs and are required by law to refund to Plaintiffs and a declaratory judgment as to the nature of the federal and state laws governing this dispute;

(2) a declaration and award of damages against Defendants for violation of 47 U.S.C. § 276 by failing to file legal tariffs and for employing discriminatory tariffs; (3) an award of damages against Defendants together with attorneys' fees and costs for violation of 47 U.S.C. § 201 by failing to abide by "just and reasonable practices"; (4) an award of damages against Defendants together with attorneys' fees and costs for violation of 47 U.S.C. § 407 by failing to pay refunds to Plaintiffs in compliance with FCC orders; (5) an award of damages against Defendants together with attorneys' fees and costs for violation of 47 U.S.C. § 416 by failing to file legal tariffs and for noncompliance with FCC orders; (6) an award of a refund of Plaintiffs' tariffs paid to Defendants in excess of the required rates together with attorneys' fees and costs for common-law unjust enrichment; (7) an award of damages against Defendants equal to the refunds not paid by Defendants to Plaintiffs as third-party beneficiaries for breach of contract between Defendants and the FCC; (8) an award of damages against Defendants together with attorneys' fees and costs for conversion of refunds to which Plaintiffs are entitled; (9) a judgment against Defendants together with attorneys' fees and costs estopping Defendants from denying their obligation to pay a refund to Plaintiffs based on statements to the FCC and the American Public Communications Council; (10) an award of damages

and punitive damages against Defendants together with attorneys' fees and costs for intentional fraud in making knowing false representations; (11) an award of damages and punitive damages against Defendants together with attorneys' fees and costs for negligent fraud in making false representations; (12) an award of damages and punitive damages against Defendants together with attorneys' fees and costs for violations of the Oregon Deceptive Trade Practices Act, Oregon Revised Statutes §§ 646.605, *et seq.*; (13) an award of damages and punitive damages against Defendants together with attorneys' fees and costs for violation of Oregon Revised Statute § 759.185 by failing to comply with mandatory refunds; (14) an award of damages and punitive damages against Defendants together with attorneys' fees and costs for violation of Oregon Revised Statute § 759.275 by affording Plaintiffs' competitors undue preferences; (15) an award of damages and punitive damages against Defendants together with attorneys' fees and costs for violation of Oregon Revised Statute § 759.455 by denying Plaintiffs access to services while providing access to Plaintiffs' competitors; (16) an award of damages and punitive damages against Defendants together with attorneys' fees and costs for lost business opportunities due to Defendants' intentional interference with Plaintiffs' business relationships and contracts; (17) an award of damages against Defendants together with attorneys' fees and costs for breach of oral and

written promises made by Qwest to Plaintiffs for refunds of noncompliant tariffs; and (18) the imposition of a constructive trust in favor of Plaintiffs for Qwest's breach of fiduciary duty by failing to refund tariffs overpaid by Plaintiffs.

On March 4, 2010, Qwest filed its Motion to Dismiss First Amended Complaint or to Stay seeking to dismiss each of Plaintiffs' claims.

On June 16, 2010, the Court heard oral argument on Qwest's Motion. At the hearing, the Court determined it would first assess Qwest's Motion to Dismiss with respect to Plaintiff's federal claims and would then address Plaintiffs' remaining state-law claims if necessary. In addition to its request for a stipulated administrative history as noted, the Court also allowed the parties to file supplemental briefs limited to the parties' arguments with respect to Plaintiffs' federal claims.

On July 22, 2010, the Court heard additional oral argument with respect to Qwest's Motion to Dismiss Plaintiffs' federal claims and took this matter under advisement.

STANDARDS

To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *[Bell Atlantic v. Twombly*, 550 U.S. 554,] 570, 127 S. Ct. 1955. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw

the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 556 The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557, 127 S. Ct. 1955 (brackets omitted).

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009). See also *Bell Atlantic v. Twombly*, 550 U.S. 554, 555-56 (2007). The court must accept as true the allegations in the complaint and construe them in favor of the plaintiff. *Intri-Plex Tech., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1050 n.2 (9th Cir. 2007). "The court need not accept as true, however, allegations that contradict facts that may be judicially noticed by the court." *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000)(citations omitted).

The court's reliance on judicially-noticed documents does not convert a motion to dismiss into a summary-judgment motion. *Intri-Plex*, 499 F.3d at 1052.

DISCUSSION

Qwest moves to dismiss each of Plaintiffs' claims and specifically moves to dismiss Plaintiffs' federal Claims One-Five on the following grounds: (1) Each of Plaintiffs' claims are

barred by the applicable statute of limitations; (2) Plaintiffs failed to state a claim with respect to Claim Four under 47 U.S.C. § 407; (3) the Court should abstain from ruling on Plaintiff's federal-law claims on the basis of the *Colorado River abstention doctrine* (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)); (4) if the Court does not abstain, the Court should decline to issue a declaratory ruling advising the PUC on issues within the agency's expertise; and (5) the Court should defer to the PUC because the PUC has primary jurisdiction to resolve this matter.

I. Statute of Limitations.

Qwest contends Plaintiffs' Claims One-Five brought pursuant to 47 U.S.C. §§ 201, 276, 407, and 416 for refunds of PAL and CustomNet charges that Plaintiffs allegedly paid in excess of the NST-compliant rates are barred by the applicable statute of limitations. Plaintiffs, however, contend their claims are timely and, in any event, assert the Court should toll the statute of limitations on equitable grounds.

A. The Law.

Qwest contends, and Plaintiffs do not dispute, that Plaintiffs' Claims One-Three brought pursuant to §§ 201 and 276 are governed by a two-year statute of limitations (see 47 U.S.C. § 415(b)) and Plaintiffs' Claim Four in which Plaintiffs seek to enforce FCC orders pursuant to §§ 407 is governed by a one-year

statute of limitations. See 47 U.S.C. § 415(f). In addition, Plaintiffs request damages in Claim Five, but they also seek to enforce FCC orders that direct Defendants to "pay the required refunds to plaintiffs as required by 47 U.S.C. § 416(c) and the related applicable orders of the FCC." The parties, however, did not explicitly address the applicable limitations period for a claim under § 416.² Thus, it is unclear whether Plaintiffs' Claim Five is a claim for damages governed by the two-year statute of limitations in § 415(b) or a claim to enforce an FCC order to pay money governed by the one-year statute of limitations under § 415(f). Based on the language of § 416(c) and Plaintiffs' Claim Five as pled, it appears Plaintiffs seek to enforce an FCC order to pay money in Claim Five, which would be subject to the one-year statute of limitations § 415(f).

The limitations periods in §§ 415(b) and (f) begin to run on claims made thereunder "from the time the cause of action accrues." Plaintiffs filed their Complaint in this Court on November 13, 2009, so the question for the Court is whether Plaintiffs' Claims One-Three accrued before November 13, 2007, and whether Plaintiff's Claims Four and Five accrued before

² Section 416(c) provides:

It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with [FCC] orders so long as the same shall remain in effect.

November 13, 2008. For purposes of federal law, a claim accrues when a would-be plaintiff has sufficient notice of an injury to put him on "inquiry notice" of a potential claim. *Davel*, 460 F.3d at 1091-92. In *Davel* the Ninth Circuit held: "Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages." *Id.* (quoting *Sprint Commc'n Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996))(citing *United States v. Kubrick*, 444 U.S. 111, 123 (1979)). After "a Plaintiff has [inquiry] notice [of its claim], it bears the responsibility of making diligent inquiries to uncover the remaining facts needed to support the claim." *Davel*, 460 F.3d at 1092 (quoting *Sprint Commc'n Co. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996)).

B. Analysis.

As noted, in their Claims One-Three, Plaintiffs seek declaratory, equitable, and legal relief under §§ 201 and 276 for Defendants' alleged failure to file NST-compliant PAL and CustomNet rates and for charging discriminatory and unreasonable rates. In their Claims Four and Five, Plaintiffs seek to enforce orders issued by the FCC that require Defendants to refund Plaintiffs for PAL and CustomNet rates charged to Plaintiffs that were not NST-compliant.

1. Claims One-Three Regarding PAL Rates.

On the basis of the Stipulation the parties filed in this matter, Qwest contends Plaintiffs knew Qwest allegedly charged PAL rates that were not NST-compliant. Thus, Qwest contends Plaintiffs' federal-law claims have accrued and the statute-of-limitations period has expired on Plaintiffs' claims for PAL refunds. In turn, Plaintiffs contend their claims related to PAL rates are timely because they could not determine whether Qwest's PAL rates, in fact, were NST-compliant until the PUC approved the final PAL rates nor could Plaintiffs calculate their damages (*i.e.*, the amount of the refund allegedly due is the difference between the rates Qwest actually charged and the NST-compliant rates). Although the parties executed a stipulation on October 15, 2007, that Qwest's PAL rates set in 2003 were NST-compliant, Plaintiffs contend their claims did not accrue until the PUC's adoption of that stipulation on November 15, 2007. Thus, because Plaintiffs filed their Complaint in this Court on November 13, 2009, they contend their claims are timely and are not barred by the two-year statute of limitations.

To support its position, Qwest points to the Ninth Circuit's holding in *Davel* with respect to the accrual of a claim under § 415 in which the court directly rejected arguments similar to those advanced by Plaintiffs:

We reject *Davel*'s contention that its cause of action did not accrue until Qwest

filed NST-compliant rates in 2003, because it had no knowledge until then that Qwest's rates were too high. The D.C. Circuit, affirming the FCC, rejected such a contention in similar circumstances in *Sprint Communications Co. v. FCC*, 76 F.3d 1221, 1227-31 (D.C. Cir. 1996) (rejecting application of a "discovery" rule of accrual where cause of action was predicated on "AT&T's failure to file and to charge cost-justified rates"). In that case, the plaintiff, Sprint, argued that it had no knowledge of its claim based on the payment of tariffed rates for telecommunications services until the defendant, AT&T, several years later, filed cost data indicating that the rates charged exceeded lawful levels. *Id.* at 1224-25. Affirming the FCC, the D.C. Circuit held that Sprint was on inquiry notice of the claim as soon as it had knowledge suggesting the rates might be improper. *Id.* at 1229-30.

* * *

The fact that, until Qwest filed its new fraud protection rates in 2003, Davel was not in a position to determine the precise amount of the overcharges, or even whether the charges were excessive at all, does not change this result.

460 F.3d at 1091-92. Accordingly, to resolve the dispute over when Plaintiffs' claims accrued, the Court must determine at what point Plaintiffs had "knowledge suggesting the rates might be improper."

In its memoranda and at oral argument, Qwest contends the stipulated record and publicly available documents put Plaintiffs on "inquiry notice" of their potential claim for PAL refunds; specifically, Plaintiffs had inquiry notice (1) when

Qwest failed to file NST-compliant rates in accordance with the FCC's Waiver Order in May 2007; (2) when NPCC filed its complaint with the PUC in May 2001 seeking refunds of PAL rates that NPCC alleged were not NST-compliant;³ (3) when Qwest reduced its PAL rates in 2003 and asserted its adjusted rates were NST-compliant; (4) when the Oregon Court of Appeals remanded in 2004 the initial rates set by the PUC in the Rate Case for failure to consider recent FCC orders clarifying the method for applying the NST; and (5) when NPCC stipulated on October 15, 2007, that Qwest's rates (filed with and approved by the PUC in 2003) were NST-compliant.

Nevertheless, Plaintiffs assert they could not determine whether Qwest's PAL rates were NST-compliant or determine Plaintiffs' damages because Qwest had not released the data required to calculate the legal tariff rates and the PUC had not determined whether Qwest's rates were NST-compliant. As noted, the *Davel* and *Sprint* courts expressly rejected similar arguments. In any event, the record here belies Plaintiffs' assertion that they lacked sufficient knowledge to form a basis for their claims until November 15, 2007. In its 2001 complaint filed with the PUC (stipulated document number 20), NPCC alleged

³ Even though Plaintiffs now inexplicably assert the PUC does not have jurisdiction over this matter, the Court notes NPCC stated in its complaint filed with the PUC in May 2001 that "[t]he OPUC has jurisdiction over this Complaint under ORS 756.500, 756.040, 756-160 through 756.200, OAR 860-013-0015, and FCC Orders in Docket Nos. CC 96-128 and CC 91-35."

"there is substantial evidence that Qwest's PAL rates have exceeded the permissible rates under the New Services Test." NPCC's complaint makes clear NPCC knew Qwest had to properly account for its costs and overhead in a manner consistent with the NST and that NPCC had "powerful evidence" that proved Qwest had not done so. The Oregon Court of Appeals decision in *Northwest Public Communications Council v. Public Utilities Commission of Oregon* also makes clear that NPCC made similar arguments at the Oregon circuit-court and appellate-court levels in 2003 and 2004. 196 Or. App. at 96-100. See also 196 Or. App. at 100-08 (Wollheim J., concurring). In addition, Qwest made reductions in its PAL rates in 2003 in order to be compliant with FCC orders (stipulated documents numbers 13-16). Moreover, in its order placing the NPCC claims in abeyance on March 23, 2005 (stipulated document number 23), the PUC notes NPCC stated in a document filed on January 18, 2005, that NPCC had calculated its damages in Oregon to be in excess of six million dollars, which demonstrates NPCC had some basis to assert it was injured by PAL rates that were not NST-compliant and could determine their damages to some extent. Ultimately NPCC stipulated on October 15, 2007, that those rates set by the PUC in 2003 were NST-compliant.⁴ Despite Plaintiffs' repeated claim in its brief that

⁴ Plaintiffs contend the terms of the stipulation before the PUC are not binding on them in this Court. The Court, however, does not rely on the stipulation as determinative of the

it would be impossible to determine whether Qwest's PAL rates were NST-compliant without a ruling from the PUC to that effect, NPCC apparently did just that when it entered into the stipulation with Qwest.

Any of these facts alone could suffice to show NPCC's knowledge that "the rates might be improper," but *in toto* they constitute overwhelming evidence of NPCC's knowledge of its claim as of May 2001 and at the latest on October 15, 2007. In any event, as noted, "[a]ccrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages." *Davel*, 460 F.3d at 1091-92. With the knowledge that Plaintiffs had, Plaintiffs bore the burden to investigate their claims, to file their claims in a court with jurisdiction, and to seek the necessary information from Qwest to permit Plaintiffs to determine the nature and extent of their injury. *See id.* Although Plaintiffs did so, they chose state fora (the PUC and Oregon courts) and elected not to file their claims in federal court.

At oral argument on July 22, 2010, Plaintiffs attempted

substance of Plaintiffs' claims but merely to demonstrate Plaintiffs' knowledge as of October 15, 2007, that the PAL and CustomNet rates they paid to Qwest before it reduced them in 2003 were not NST-compliant and that Plaintiffs had a refund claim.

to distinguish *Davel* based on the fact that the Ninth Circuit did not consider the issue of the statute of limitations with respect to PAL rates. Although Plaintiffs are correct that the statute of limitations for the plaintiffs' PAL claims in *Davel* was not at issue, that fact does not change the Ninth Circuit's general restatement of the nature of accrual of a claim or its analysis of § 415(b) and does not affect this Court's application of those rules to its assessment of the timing of Plaintiffs' knowledge of their claims.

On this stipulated record, therefore, the Court concludes Plaintiffs were on inquiry notice of their claims for refunds associated with PAL rates charged by Qwest before November 13, 2007. Accordingly, Plaintiffs' Claims One-Three for relief associated with PAL rates charged by Qwest are barred by the two-year statute of limitations under 47 U.S.C. § 415(b).

2. Claims One-Three regarding CustomNet Rates.

To support its contention that Plaintiffs' claims related to CustomNet rates are time-barred, Qwest asserts similar bases to those asserted against Plaintiffs' PAL-related claims. Again, Qwest asserts Plaintiffs had sufficient knowledge of their claims related to CustomNet rates for Plaintiffs' claims to accrue. Specifically, Qwest contends Plaintiffs had knowledge of their CustomNet claims (1) when Qwest failed to file NST-

compliant rates in accordance with the FCC's Waiver Order in May 2007; (2) when Qwest reduced its CustomNet rates in 2003 and asserted its rates were NST-compliant; (3) when the Oregon Court of Appeals remanded in 2004 the initial rates set by the PUC in the Rate Case for failure to consider recent FCC orders clarifying the NST; and (4) when NPCC stipulated on October 15, 2007, that Qwest's CustomNet rates (filed with and approved by the PUC in 2003) were NST-compliant.

Plaintiffs rely on *Davel* to support their argument that a rolling two-year statute of limitations applies in this matter, which makes actionable any tariff payments that Plaintiffs made to Qwest that were not based on NST-compliant rates. See *Davel*, 460 F.3d at 1093 ("[A]mounts paid under non-compliant tariffs within two years prior to the filing of the complaint are timely."). In October 2007 the parties stipulated that Qwest filed NST-compliant rates in 2003. On this record, Plaintiffs have not shown they paid any PAL or CustomNet rates since 2003 that were not NST-compliant. In fact, it appears Plaintiffs paid NST-compliant rates for six years before filing this action. Thus, without deciding whether a rolling statute of limitations actually applies here, Plaintiffs' claims associated with CustomNet rates would be time-barred under the circumstances even if a rolling statute of limitations applied.

Plaintiffs attempt to distinguish *Davel* based on the

fact that Qwest had not filed CustomNet rates with the FCC at the time the Ninth Circuit considered the matter. The Ninth Circuit concluded in *Davel* that the plaintiffs' claim accrued when Qwest missed the deadline in 1997 to timely file CustomNet rates in accord with the FCC. *Id.* at 1091-92. In *Davel*, however, it appears Qwest filed its CustomNet rates with the state commissions, and here Qwest filed its CustomNet rates with the PUC as well. *Id.* See also *Northwest Public Comm. Council*, 196 Or. App. at 96-97. Thus, it appears *Davel* is not distinguishable on this ground. To the extent there is a factual distinction, it is a distinction without a difference because Qwest's failure to file with the FCC did not bear on the Ninth Circuit's discussion of what constitutes accrual for purposes of a statute-of-limitations analysis; i.e., accrual concerns a potential plaintiff's knowledge of the existence of a claim rather than knowledge of all of its particulars. Thus, NPCC "was on inquiry notice of the claim as soon as it had knowledge suggesting the rates might be improper." See *id.* at 1092. As noted, on this record Plaintiffs had knowledge of Qwest's failure to comply with FCC orders, and, therefore, Plaintiffs were on inquiry notice before November 13, 2007.

Ultimately the Court's analysis with respect to PAL rates applies with equal force to Plaintiffs' CustomNet claims. Accordingly, the Court concludes Plaintiffs' Claims One-Three

associated with CustomNet rates charged by Qwest are barred by the two-year statute of limitations under 47 U.S.C. § 415(b).

3. Claims Four and Five Regarding Enforcement of FCC Orders.

Qwest also contends Plaintiffs' Claims Four and Five to enforce FCC orders under §§ 407 and 416 are time-barred by the one-year statute of limitations under § 415(f). In its First Amended Complaint, Plaintiffs seek enforcement of FCC orders requiring LECs to refund the difference between the rates it charged PSPs and the NST-compliant rates. Plaintiffs do not appear to seek to enforce any order issued after November 13, 2006, and Plaintiffs did not identify any such order at oral argument. In any event, the record does not reflect there was an FCC order issued after 2002 that required LECs to refund rates charged in excess of the NST-compliant rates, and it appears the only order requiring Defendants to do so is the Waiver Order issued by the FCC on April 15, 1997.

Accordingly, the Court concludes Plaintiffs' Claims Four and Five to enforce FCC orders pursuant to §§ 407 and 416 are barred by the one-year statute of limitations under 47 U.S.C. § 415(f). To the extent either Claim Four or Five could be construed as claims for damages governed by the two-year statute of limitations under § 415(b), the Court's analysis of the statute's application to Plaintiff's Claims One-Three would apply with equal force to Claim Four or Five, and those claims would

still be time-barred.

4. Equitable Tolling.

Even if the statute of limitations bars their claims, Plaintiffs maintain the Court should exercise its discretion to equitably toll the limitations period. Plaintiffs point to their vigorous litigation of this issue from 1997 to the present and contend the statute should be tolled during the period that they were opposing both Qwest's proposed rates and the PUC's formulation of the NST-compliant rates.

In *Huseman v. Icicle Seafoods, Inc.*, the Ninth Circuit stated:

Equitable tolling "focuses on whether there was excusable delay by the plaintiff" and "may be applied if, despite all due diligence, a plaintiff is unable to obtain vital information bearing on the existence of his claim." *Santa Maria*, 202 F.3d at 1178 (emphasis added); see also *Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 429, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965)(allowing equitable tolling if "a plaintiff has not slept on his rights, but rather, has been prevented from asserting them").

471 F.3d 1116, 1120 (9th Cir. 2006). Qwest, however, maintains even when a party can establish grounds for equitable tolling, the tolling ceases after a party has legal representation as set out by the Ninth Circuit in *Johnson v. Henderson*:

The doctrine of equitable tolling "has been consistently applied to excuse a claimant's failure to comply with the time limitations where she had neither actual nor constructive

notice of the filing period." *Leorna*, 105 F.3d at 551. It focuses on whether there was excusable delay by the plaintiff: "If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can gather what information he needs." *Santa Maria*, 202 F.3d at 1178 (citations omitted); see also *Boyd v. United States Postal Serv.*, 752 F.2d 410, 414 (9th Cir. 1985) ("The time period for filing a complaint of discrimination begins to run when the facts that would support a charge of discrimination would have been apparent to a similarly situated person with a reasonably prudent regard for his rights.")(citation omitted). However, "once a claimant retains counsel, tolling ceases because she has gained the means of knowledge of her rights and can be charged with constructive knowledge of the law's requirements." *Leorna*, 105 F.3d at 551 (citing *Stallcop v. Kaiser Found. Hosps.*, 820 F.2d 1044, 1050 (9th Cir.), cert. denied, 484 U.S. 986, 108 S. Ct. 504, 98 L. Ed. 2d 502 (1987))(internal quotation marks omitted).

314 F.3d 409, 414 (9th Cir. 2002).

At oral argument, Plaintiffs' counsel did not offer any basis for disregarding Qwest's argument as to the cessation of equitable tolling when a party has legal representation, and Plaintiffs conceded they were represented by counsel at least as of May 2001 when NPCC filed its complaint with the PUC. Plaintiffs, therefore, have been represented by counsel since at least 2001 and "can be charged with constructive knowledge of the law's requirements." *Id.* Thus, the Court finds NPCC had knowledge that the Federal Communications Act provided Plaintiffs

with the option to invoke the jurisdiction of the federal district court to hear claims for damages for violations "under the provisions of this chapter." 47 U.S.C. § 207. Accordingly, the Court declines to exercise its discretion to toll the statute of limitations on this ground.

Because the Court has concluded each of Plaintiffs' federal-law claims are barred by the applicable statute of limitations, the Court need not address the remaining grounds advanced by Qwest for dismissal of Plaintiffs' federal-law claims.

II. Plaintiffs' State-Law Claims 6-18.

In addition, the Court concludes it does not have jurisdiction over Plaintiffs' state-law Claims 6-18. In their First Amended Complaint, Plaintiffs assert this Court has federal jurisdiction pursuant to 28 U.S.C. § 1337 under which the district Courts have "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." Plaintiffs' federal Claims One-Five arise under the Federal Communications Act, which regulates commerce and protects it against monopolies, and, on that basis, Plaintiffs assert the Court has supplemental jurisdiction over their state-law Claims 6-18 pursuant to 28 U.S.C. § 1337. The Court, however, has already dismissed Plaintiffs' federal Claims One-Five. In accordance with § 1337(c), the "district courts may decline to

exercise supplemental jurisdiction over a [state-law claim] if . . . the district court has dismissed all claims over which it has original jurisdiction."

At both oral arguments, the Court raised the issue of supplemental jurisdiction in the absence of Plaintiffs' federal claims, and Defendant asserted in its Supplemental Memorandum (#55) that if Plaintiffs' federal claims were dismissed, the Court would no longer have jurisdiction over Plaintiffs' state-law Claims 6-18. At oral argument on June 16, 2010, Plaintiffs' counsel acknowledged the Court would not have authority to act on Plaintiffs' state-law claims in the absence of the federal-law claims.

Accordingly, the Court declines to exercise jurisdiction over Plaintiffs' state-law Claims 6-18 and, therefore, dismisses this action in its entirety.

CONCLUSION

For these reasons, the Court **GRANTS** Defendant Qwest's Motion (#12) to Dismiss and **DISMISSES** this matter in its entirety.

IT IS SO ORDERED.

DATED this 25th day of October, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

